

**ENERGY FACILITY SITING COUNCIL
OF THE STATE OF OREGON**

In the Matter of the Final Retirement Plan and)
Termination of the Perennial Wind Chaser)
Station Site Certificate)

FINAL ORDER ON FINAL
RETIREMENT PLAN AND SITE
CERTIFICATE TERMINATION

September 27, 2022

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I. INTRODUCTION

The Energy Facility Siting Council (Council) issues this final order in accordance with OAR 345-027-0110(7) and (8) approving the retirement plan proposed by Perennial WindChaser LLC (certificate holder)¹ for the components of Perennial Wind Chaser Station constructed to date (2020); and, based on the findings of fact below affirming that the facility site has been restored in accordance with the approved retirement plan, approve the request for site certificate termination for the Perennial Wind Chaser Station.

The findings of fact and conclusions of law, as presented in this order, are based on Council's September 27, 2022 review of the July 18, 2022 Application for Termination for the Perennial Wind Chaser Station Site Certificate and comments received on the proposed retirement plan during the July 29 – August 31, 2022 comment period.

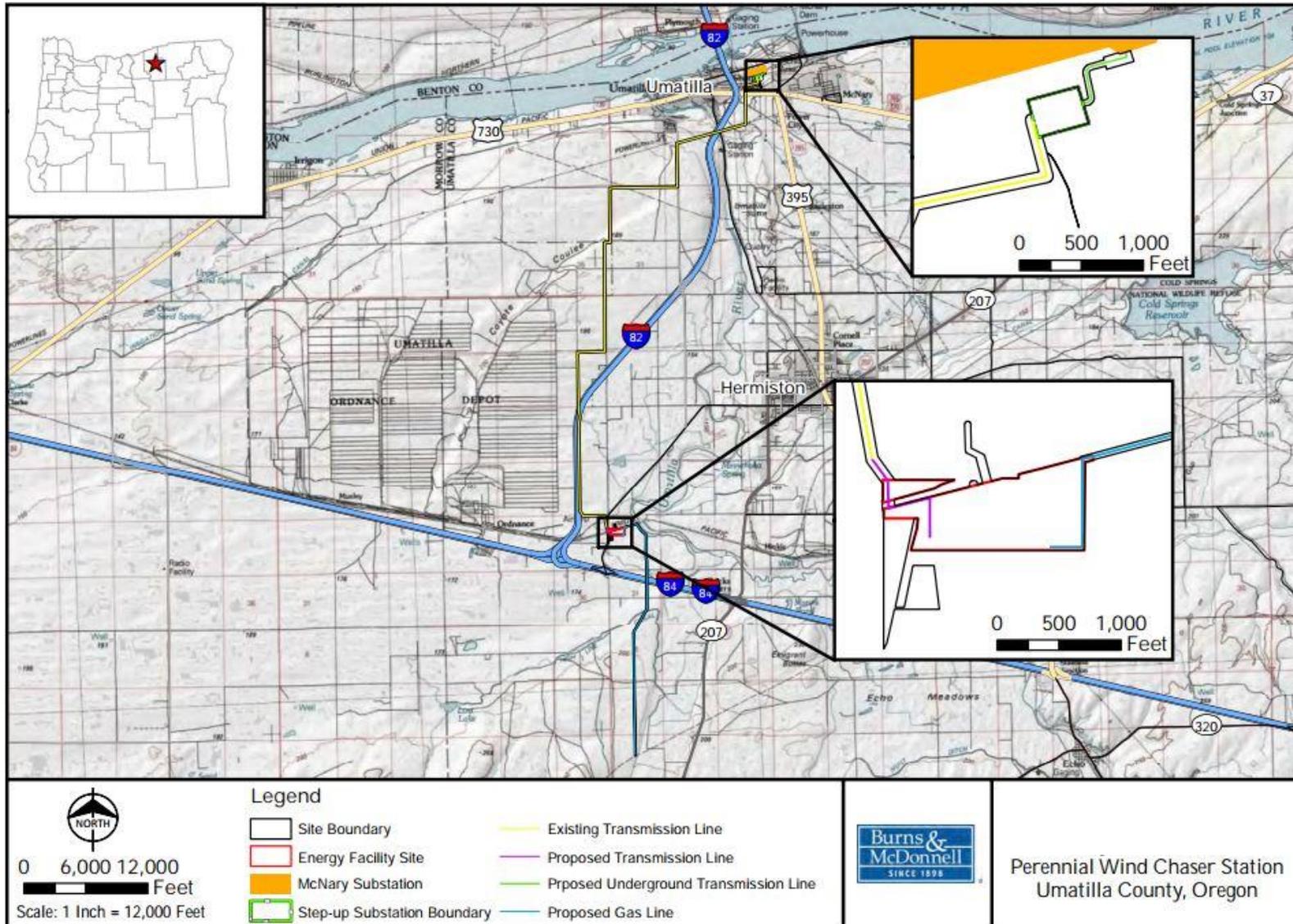
I.A. Approved Facility and Location

The Perennial Wind Chaser Station Site Certificate authorized construction and operation of a natural gas facility that would consist of up to four natural gas-fired combustion turbine generators with a maximum capacity of 415 megawatts (MW). In addition, the facility was approved to include the following related and supporting facilities: lateral natural gas pipeline, reconducted transmission line, step-up substation, interconnecting water pipelines, utility lines, temporary construction facilities, and operations and maintenance facilities.

The location of the approved facility site boundary is located in northwestern Umatilla County just northeast of the intersection of Interstate 84 and Interstate 82, as presented in Figure 1 below. The site boundary crosses or is located within multiple zones in the city and county of Umatilla including: Exclusive Farm Use (EFU), Light Industrial (LI), Rural Tourist Commercial (RTC), General Rural, Heavy Industrial, Agricultural Residential, Neighborhood Commercial, Residential, single family; and, Residential, multi-family.

¹ The certificate holder is a wholly-owned subsidiary of Perennial Power Holdings, Inc., which is a wholly-owned subsidiary of Sumitomo Corporation and Sumitomo Corporation of America.

Figure 1: Perennial Wind Chaser Station - Regional Location of Approved Site Boundary



I.B. Site Certificate Procedural Summary

Final Order on Application for Site Certificate

The Council issued *Final Order on the Application for Site Certificate* (Final Order on the ASC) for the Perennial Wind Chaser Station on September 18, 2015. The site certificate became effective upon execution on September 23, 2015. Council imposed Conditions A.1 and A.2 which required the certificate holder to begin construction within three years of the effective date of the site certificate (that is, before September 23, 2018), and complete construction within six years of the effective date (September 23, 2021).

Final Order on Amendment 1

The Council issued *Final Order on Request for Site Certificate Amendment 1* on November 22, 2019, authorizing extensions to the construction deadlines by two years, from September 23, 2018 to September 23, 2020 for commencement; and, from September 23, 2021 to September 23, 2023 for completion. The First Amended Site Certificate was fully executed on December 20, 2019.

Commencement of Facility Construction

On June 25, 2020, pursuant to OAR 345-026-0048², the certificate holder submitted a draft compliance plan to the Oregon Department of Energy (Department) for review and approval. The draft compliance plan identified conditions and the compliance plan for those conditions that the certificate holder considered to be applicable to the facility components planned for construction in 2020, including an approximately 200-foot by 30-foot access road and access bridge crossing the Westland Irrigation District canal located in Umatilla County in EFU zoned land.

On September 18, 2020, following review of the June 25, 2020 compliance plan, additional information requested by the Department and an updated compliance plan received in September 2020, the Department sent a letter to the certificate holder stating they had demonstrated compliance with all applicable pre-construction site certificate conditions. On September 21, 2020, the Department sent a letter to the certificate holder acknowledging that sufficient evidence had been received to demonstrate that construction³ had commenced prior to the September 23, 2020 construction commencement deadline.

² OAR 345-026-0048 states, "Following receipt of a site certificate or an amended site certificate, the certificate holder shall implement a plan that verifies compliance with all site certificate terms and conditions and applicable statutes and rules. As a part of the compliance plan, to verify compliance with the requirement to begin construction by the date specified in the site certificate, the certificate holder shall report promptly to the Department of Energy when construction begins. Construction is defined in OAR 345-001-0010. In reporting the beginning of construction, the certificate holder shall describe all work on the site performed before beginning construction, including work performed before the Council issued the site certificate, and shall state the cost of that work. For the purpose of this exhibit, "work on the site" means any work within a site or corridor, other than surveying, exploration or other activities to define or characterize the site or corridor. The certificate holder shall document the compliance plan and maintain it for inspection by the Department or the Council."

³ ORS 469.300(6) defines "construction" as "work performed on a site, excluding surveying, exploration or other activities to define or characterize the site, the cost of which exceeds \$250,000."

Since the initial 12-week construction period in 2020, no other facility components have been constructed.

II. SITE CERTIFICATE TERMINATION PROCESS RULES AND FINDINGS OF FACTS

II.A. Application for Termination Procedural Summary

OAR 345-027-0110 – Termination of a Site Certificate

- (5) *In the proposed final retirement plan, the certificate holder must include:*
- (a) *A plan for retirement that provides for completion of retirement without significant delay and that protects public health, safety and the environment;*
 - (b) *A description of actions the certificate holder proposes to take to restore the site to a useful, non-hazardous condition, including information on how impacts to fish, wildlife and the environment would be minimized during the retirement process;*
 - (c) *A current detailed cost estimate and a plan for ensuring the availability of adequate funds for completion of retirement; and*
 - (d) *An updated list of property owners, as described in OAR 345-021-0010(1)(f).*
- (6) *Within 15 days after receiving an application for termination of a site certificate, the Department must:*
- (a) *Send a notice of the application, specifying a date by which comments on the application are due, by mail or email to:*
 - (A) *All persons on the Council's general mailing list, as defined in OAR 345-011-0020;*
 - (B) *All persons on any special list established for the facility; and*
 - (C) *The property owners on the updated list submitted by the certificate holder under section (5) of this rule;*
 - (b) *Send copies of the application for termination by mail or email to the reviewing agencies for the facility, and ask those agencies to comment by a specified date; and*
 - (c) *Post an announcement of the application for termination on the Department's website.*

On July 18, 2022 the certificate holder submitted to the Department a proposed final retirement plan and an application to terminate the site certificate. After evaluating the proposed final retirement plan, the Department concluded that it contained all of the requirements of OAR 345-027-0110(5), as listed above.

Facility components constructed in 2020 are presented in Figures 2 and 3 below. Because the only facility components constructed were the access road and bridge, the proposed final retirement plan only applies to these components. The certificate holder requested to leave these facility components in place and asserts that they are “beneficial and necessary to maintain the usefulness”⁴ of the property, which certificate holder owns.

⁴ PER Application to Terminate Site Certificate, p. 2. 2022-07-18.

On July 29, 2022 the Department issued notice of the proposed retirement plan and application to terminate site certificate to all persons and property owners in sub (a) above which included property owners within 500-feet of the property boundary for which the site boundary of the facility components constructed in 2020 are located, Council's general mailing list and the special mailing list established for the facility. On the same day, the Department sent copies to reviewing agencies and posted the request and public notice of the project page at: <https://www.oregon.gov/energy/facilities-safety/facilities/Pages/PER.aspx>

Figure 3: Perennial Wind Chaser Station – Road and Bridge (Current Conditions)



II.B. Certificate Holder's Proposed Retirement Plan

Findings of Fact

The certificate holder's proposed retirement plan is evaluated based on the requirements established in OAR 345-027-0110(5).

(5)(a) A plan for retirement that provides for completion of retirement without significant delay and that protects public health, safety and the environment

The proposed plan for retirement of the facility components constructed in 2020, including the road and bridge, included no tasks or actions and requested to leave the road and bridge in place, as presented in Figure 3 above. The road and bridge are located on 0.15 acres of the approximately 20-acre property. According to the application⁵, the property is accessed via Westland Road. The Westland Irrigation District canal is located approximately 200 feet east of Westland Road and is the only access point for the remainder of the property.

To support the proposed retirement plan, the Application for Termination includes Exhibit 2: 1200-C Termination and Exhibit 3: Letter from Umatilla County. Exhibit 2 provides the Oregon Department of Environmental Quality's (DEQ) Stormwater Permitting Program termination of the 1200-C Construction Stormwater Permit, dated April 27, 2022. Termination by DEQ of 1200-C permits can only occur once DEQ has determined that all exposed soils have been stabilized through vegetation, paving or building; and, that all temporary erosion and sediment controls have been removed and properly disposed. Exhibit 3 provides comments from Umatilla Planning Director, Robert Waldher, dated May 17, 2022 affirming that the access road and bridge constructed on the property are considered accessory to the use of the property and would be considered by Umatilla County Planning Department to be allowable as a continued use after site certificate termination.

The Council finds that the DEQ termination of the 1200-C permit, which relied upon certificate holder certification and review of photo evidence, and letter from Umatilla County provide sufficient evidence that the proposed retirement plan satisfies OAR 345-027-0110(5)(a).

(5)(b) A description of actions the certificate holder proposes to take to restore the site to a useful, non-hazardous condition, including information on how impacts to fish, wildlife and the environment would be minimized during the retirement process;

Actions to restore the site following construction of the road and bridge occurred in 2020-2022, including stabilization of exposed soils, revegetation via hydroseeding and removal and disposal of erosion and sediment control materials, as is evidenced by the DEQ's April 2022 termination of the 1200-C permit (Application for Termination Exhibit 2). The certificate holder proposes to

⁵ Application for Site Certificate – Exhibit B – Page B-2

maintain the road and bridge in place, as described in this order, with no subsequent restoration actions.

Restoring the site of an energy facility to a useful, non-hazardous condition does not necessarily mean returning it to the state that it was in prior to construction of the facility. It is the certificate holder's responsibility to propose in its retirement plan what "useful, non-hazardous" means for each specific energy facility site and Council's responsibility to analyze that request and determine whether or not they agree. In making its determination the Council may evaluate a combination of the underlying zoning of the property and the uses allowed in that zoning, the surrounding land uses and the desires of the landowner to determine what, if any, of the energy facility components may remain. These are analyzed in turn below.

Zoning designation: The property on which the bridge and road are located is in unincorporated Umatilla County within EFU zoned land. While this zoning designation is primarily for the purpose of agricultural activities, there are other uses allowed in that zone as established in ORS 215.283. These include but are not limited to: churches, utility facilities necessary for a public service, farm dwellings, farm stands, parks and playgrounds, community centers, golf courses, non-farm dwellings and commercial utility facilities for the purposes of generating power for public use by sale. Some of these uses are allowed without any regulatory review whereas others require a much more significant review. However, all of these listed uses, and most if not all of the other uses listed in the statute require access to the property. In the certificate holder's request they include a May 7, 2022 letter from Robert Waldher, Umatilla County Planning Director supporting maintaining the road and bridge in place on the property. In that letter Mr. Waldher states in part:

"Our department finds that the existing developments on the property (i.e. access road, and bridge) have received proper permits through the County Planning Department, are considered accessory to the use of the property, and will be allowed to continue use after project termination".

Surrounding Uses: According to the Umatilla County Planning Department's West County Zoning map, available on their webpage⁶, the properties to the north, south and west of the facility site have varying types of industrial zoning and the east side of the property is zoned Exclusive Farm Use. According to the certificate holder's request, and as can be seen on the map submitted in their request, these surrounding industrial zoned lands include an Amazon data center, a United Parcel Service customer center, a Fed Ex freight center and an EFSC jurisdictional gas plant, among other industrial uses.

Desires of the Landowner: The parent company of the certificate holder is the underlying landowner and it is their desire, as stated in their request, to retain the road and bridge to

⁶ https://co.umatilla.or.us/fileadmin/user_upload/Planning/GIS_Maps/WestCounty_Zoning.pdf

allow access to the property for a future use that is allowed by the underlying zoning designation.

The Council finds that leaving the road and bridge in place is consistent with the underlying zoning and potential uses of the property, is consistent with the surrounding uses and is desired by the property owner. Therefore, the Council finds that the certificate holder’s proposed retirement plan satisfies OAR 345-027-0110(5)(b).

(5)(c) A current detailed cost estimate and a plan for ensuring the availability of adequate funds for completion of retirement; and

A detailed cost estimate for retirement of the road and bridge is presented in Table 1 below.

Table 1: Proposed Retirement Plan

Facility Component	Retirement Cost Estimate
Roads	\$0
Concrete Removal, Crushing & Disposal	\$0
Grading and Seeding	\$0
Source: Application for Termination, Exhibit 6 – see Attachment 1 of this order	

As presented in the table, because the retirement plan proposes to maintain the road and bridge in place, the proposed retirement plan offers no cost for retirement. The plan for ensuring adequate funds is not applicable under the certificate holder’s proposed retirement plan. However, Application for Termination Exhibit 7 provides a copy of the letter of credit issued on September 16, 2020 by MUFG Bank, Ltd to the certificate holder for \$110,000. The \$110,000 represents the decommissioning estimate at pre-construction, as required as a preconstruction condition to be estimated and provided via letter of credit or bond issued by a Council approved financial institution to the Department.

The Council finds that the cost estimate and evidence provided on the availability of adequate funds satisfies OAR 345-027-0110(5)(c).

(7) The Council must review the proposed final retirement plan and must consider any comments received from the public and the reviewing agencies. The Council may approve the proposed final retirement plan or modify the plan to comply with the rules of this chapter and applicable conditions in the site certificate. If the plan is approved, the Council must issue an order authorizing retirement according to the approved or modified final retirement plan and subject to any conditions the Council finds appropriate. The Council's order may be appealed as described in ORS 183.480.

During the 31-day comment period, two written comments were received. All public comments received were entered into the siting docket available on the ODOE webpage. Issues raised in public comments are summarized below and included in Attachment 2.

- Columbia Riverkeeper – Columbia Riverkeeper contends that the construction of the access road and bridge were done so in violation of the Clean Water Act and pre-construction conditions in the site certificate; therefore, to discourage other applicants from such illegal behavior, EFSC’s final site retirement plan should require the certificate holder to remove these two facility components.
- Friends of the Columbia Gorge – Although Friends of the Columbia Gorge does not oppose the termination of the site certificate, they indicate that construction commencement at the facility was not authorized nor demonstrated, and thus the site certificate expired on September 23, 2020. Furthermore, they state that that the phased approach to constructing the facility was not authorized or contemplated in the site certificate.

On August 29, 2022 the certificate holder requested additional time to respond to the two submitted comments. The Department granted their request, and the certificate holder was allowed seven days to respond (September 6, 2022). Their response is included in Attachment 2.

In response to the issues raised in the comments referenced above, the certificate holder asserts that it would be more negatively impactful to the environment to remove the bridge than to leave it in place. Deconstruction activities include but are not necessarily limited to digging, blasting, crushing and scooping with large machinery that could impact the public health, safety and environment.

The Council finds the Columbia Riverkeeper’s comments are not specific to the certificate holder’s proposed retirement plan, but rather focus on issues not currently under review or relevant. The question of whether the bridge and road were constructed in violation of the Clean Water Act and pre-construction conditions were evaluated separately by DEQ and the Department. The Council affirms the Department’s analysis of preconstruction compliance and affirms that DEQ’s termination of the 1200-C permit demonstrates that there are no pending or unresolved compliance issues.

The Council finds that Friends of the Columbia Gorge comments similarly are not within the scope of Council’s review of the proposed retirement plan. The question of whether the Department erred in authorizing a phased construction approach is not under review or part of the Application for Termination.

To the extent the comments received relate to the proposed retirement plan, the Council finds that they have not raised any questions of relevant fact or law and that the certificate holder’s proposed retirement plan would result in a useful, nonhazardous site; it would better protect the public health, safety and the environment than deconstructing the components.

(7) The Council may approve the proposed final retirement plan or modify the plan to comply with the rules of this chapter and applicable conditions in the site certificate.

The certificate holder was required to adhere to, and the Department was required to evaluate 25 preconstruction and 6 construction conditions associated with the road and the bridge. However, only the most relevant conditions to the request to retire the facility and terminate the site certificate, as well as the submitted comments, are included below.

PRE-LU-01

Prior to beginning construction, the certificate holder shall obtain all required land use approvals from Umatilla County as listed in the letter from the Umatilla County Board of Commissioners dated May 14, 2015, and shall submit all associated applications and pay all associated application fees.

[Final Order Condition E.5]

As previously stated, and as if evidenced by the May 7, 2022 letter from the Umatilla County Planning Director sent to the Department, the certificate holder received all required land use approvals from Umatilla County for the road and the bridge, which the County determined are accessory to the use of the property and may remain if the site certificate is terminated.

PRE-RT-01

Before beginning construction of the facility, the certificate holder shall submit to the State of Oregon, through the Council, a bond or letter of credit in a form and amount satisfactory to the Council to restore the site to a useful, non-hazardous condition. The certificate holder shall maintain a bond or letter of credit in effect at all times until the facility has been retired. The Council may specify different amounts for the bond or letter of credit during construction and during operation of the facility.

[Final Order Condition G.3] [Mandatory Condition 345-025-0006(8)]

Prior to beginning construction, the certificate holder submitted a letter of credit determined by the Department to be the amount necessary to remove the road and the bridge. This amount was based on the retirement costs approved in the site certificate, adjusted for inflation. The current amount of the letter of credit is \$110,000, which the Department still retains. A copy of this letter of credit is included in the certificate holder's request (Exhibit 6). Only after termination of the site certificate has been approved and all appeal periods have concluded will the letter of credit be returned to the certificate holder.

GEN-GS-04

The certificate holder shall design, construct, operate, and retire the facility: (a) Substantially as described in the site certificate (b) In compliance with the requirements of ORS Chapter 469, applicable Council rules, and applicable state and local laws, rules and ordinances in effect at the time the site certificate is issued; and (c) In compliance with all applicable permit requirements of other state agencies

[Final Order Condition A.4; Mandatory Condition 345-025-0006(3)]

In October 2020, based on information received from Columbia Riverkeeper that the certificate holder did not have an active DEQ National Pollutant Discharge Elimination System Construction Stormwater Discharge Permit, the Department coordinated with DEQ. The certificate holder asserted that based on their evaluation of the requirements, this permit was not required for the construction activities associated with the road and the bridge. However, after DEQ evaluated the construction activities they concluded that this permit was needed. Subsequent to that determination the certificate holder applied for and received this permit from DEQ.

Application for Termination Exhibit 6 is DEQ's termination of this permit. Therefore, the constructed portions of the facility complied with condition GEN-GS-04.

GEN-OE-01

The certificate holder shall prevent the development of any conditions on the site that would preclude restoration of the site to a useful, non-hazardous condition to the extent that prevention of such site conditions is within the control of the certificate holder.

[Final Order Condition B.5; Mandatory Condition 345-025-0006(7)]

The certificate holder is requesting to retain the road and the bridge, therefore, there will be no activities required to restore the site to a useful, non-hazardous condition. After completing the construction of the road and the bridge and coming into compliance with DEQ's permitting requirements, there are no conditions on the site that would preclude restoration to a useful, non-hazardous condition.

RET-RT-01

The certificate holder shall retire the facility if the certificate holder permanently ceases construction or operation of the facility. The certificate holder shall retire the facility according to a final retirement plan approved by the Council, as described in OAR 345-027-0110. The certificate holder shall pay the actual cost to restore the site to a useful, non-hazardous condition at the time of retirement, notwithstanding the Council's approval in the site certificate of an estimated amount required to restore the site.

[Final Order Condition G.1; Mandatory Condition 345-025-0006(9)]

The certificate holder's submittal of the proposed final retirement plan and application to terminate the site certificate is consistent with this condition.

(7) If the plan is approved, the Council must issue an order authorizing retirement according to the approved or modified final retirement plan and subject to any conditions the Council finds appropriate.

For the reasons stated in the analysis in the criteria above, and summarized immediately below, the Council approves the proposed final retirement plan as the final retirement plan and issues this final order also approving the site certificate termination.

- The constructed road and bridge are accessory to the use of the property;
- The constructed road and bridge are allowable and have received permits for siting within the underlying zone and on the subject property; and are consistent with adjacent industrial zones
- Removing the road and bridge would be more negatively impactful to the public health, safety and environment than leaving them in place; and
- Leaving the road and bridge will leave the property in a useful, non-hazardous condition

II.C. Site Certificate Termination

(8) When the Council finds that the certificate holder has completed the retirement of the facility according to the Council's order authorizing retirement, the Council must issue an order terminating the site certificate

Findings of Fact

Application for Termination includes Exhibit 2: 1200-C Termination and Exhibit 3: Letter from Umatilla County. Exhibit 2 provides the Oregon Department of Environmental Quality's (DEQ) Stormwater Permitting Program termination of the 1200-C Construction Stormwater Permit, dated April 27, 2022. Termination by DEQ of 1200-C permits can only occur once DEQ has determined that all exposed soils have been stabilized through vegetation, paving or building; and, that all temporary erosion and sediment controls have been removed and properly disposed. Exhibit 3 provides comments from Umatilla Planning Director, Robert Waldher, dated May 17, 2022 affirming that the access road and bridge constructed on the property are considered accessory to the use of the property and would be considered by Umatilla County Planning Department to be allowable as a continued use after site certificate termination.

Based on these facts, the Council finds that the certificate holder has completed the retirement of the facility in accordance with the approved retirement plan.

III. GENERAL CONCLUSIONS

- The certificate holder submitted all requirements associated with OAR 345-027-0110, Termination of a Site Certificate.
- The Council reviewed the proposed final retirement plan, timely submitted public comments and the certificate holder's response to those comments and concludes that the road and bridge can be left in place because:
 - they are accessory to the use of the property;
 - they are allowable and have received permits for siting within the underlying zone and on the subject property;

- they are consistent with adjacent industrial zones;
- removing them would be more negatively impactful to the public health, safety and environment than leaving them in place; and
- leaving them in place will leave the property in a useful, non-hazardous condition

As a result, the Council approves the proposed final retirement plan as the final retirement plan.

- The Council determines that because there are no facility components to remove, the certificate holder has complied with the final retirement plan and terminates the site certificate for the Perennial Wind Chaser Station.
- The Council has the authority to issue a single final order both approving the proposed final retirement plan as the final retirement plan and terminating the site certificate for Perennial Wind Chaser Station.

IV. FINAL ORDER

The Council issues this single order with findings of fact, reasoning, and conclusions of law approving both the proposed final retirement plan as the final retirement plan and terminating the site certificate for Perennial Wind Chaser Station.

Issued this 27^h day of September 2022

The OREGON ENERGY FACILITY SITING COUNCIL

By: 
Marcia L. Grail (Oct 3, 2022 11:29 PDT)

Marcia L. Grail, Chair
Oregon Energy Facility Siting Council

Attachment 1: Proposed Retirement Plan

Attachment 2: Public Comments on Application to Terminate Site Certificate

Appeal Rights

The right to judicial review of this final order approving the final retirement plan and site certificate termination is governed by OAR 345-027-0110(7) & (8) and ORS 183.484. Pursuant to ORS 183.484, jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. To appeal you must file a petition for judicial review within 60 days from the day this final order was served.

If this order was e-mailed or mailed to you, the date of service is the date it was e-mailed or mailed, not the date you received it. The date of service for any persons to whom this final order was not e-mailed or mailed is the date it was posted to the Oregon Department of Energy Siting webpage. If you do not file a petition for judicial review within the applicable time period noted above, you lose your right to appeal.

Attachment 1: Proposed Final Retirement Plan

Perennial Wind Chaser Station - Proposed Retirement Plan

2018 RFA1 Approved Site Restoration Plan	W/O ZLD	W ZLD	Applicable	Phase 1 Site restoration Plan	Projected Cost	Notes	Retirement Cost Estimate
Switchyard & Substation	\$128,000	\$128,000	No	\$0	\$0		\$0
Balance of Plant Misc.	\$1,065,000	\$1,028,000	No	\$0	\$0		\$0
Roads ¹	\$55,000	\$55,000	Yes	\$55,000	\$4,000	Road remains	\$0
All Balance of Plant Buildings	\$14,000	\$14,000	No	\$0	\$0		\$0
Fuel Equipment	\$118,000	\$118,000	No	\$0	\$0		\$0
All Other Tanks	\$36,000	\$36,000	No	\$0	\$0		\$0
Transformers & Foundation	\$341,000	\$341,000	No	\$0	\$0		\$0
Cooling Towers & Basin	\$216,000	\$216,000	No	\$0	\$0		\$0
ZLD System	--	\$47,000	No	\$0	\$0		\$0
Hazardous Waste Disposal	\$500,000	\$500,000	No	\$0	\$0		\$0
Concrete Removal, Crushing, & Disposal ²	\$66,000	\$66,000	Yes	\$66,000	\$43,000	Bridge remains	\$0
Grading & Seeding ³	\$317,000	\$317,000	Yes	\$317,000	\$16,000	Completed prior to 1200-C termination	\$0
Debris	\$18,000	\$18,000	No	\$0	\$0		\$0

Notes:

- 1 Reference cell L:23 of the "By Unit Summary Round" tab of the PWC 8.30.20 decommissioning spreadsheet
- 2 Reference cell L:39 of the "By Unit Summary Round" tab of the PWC 8.30.20 decommissioning spreadsheet
- 3 Reference cell L:40 of the "By Unit Summary Round" tab of the PWC 8.30.20 decommissioning spreadsheet

Subtotal	\$63,000
CPI Adjustment	\$64,411.93
Overhead (10%)	\$6,441.19
Profit (10%)	\$7,085.31
Insurance (3%)	\$2,338.15
Subtotal	\$80,276.59
Performance Bond (1%)	\$802.77
Gross Cost	\$81,079.36
Administration & PM (10%)	\$8,107.94
Future Development contingency (20%)	\$16,215.87
Phase 1 Site restoration Cost (Q3 2020)	\$105,403.16

**Attachment 2: Public Comments on Proposed Final Retirement Plan &
Application to Terminate Site Certificate and Site Certificate
Holder's Response**

ESTERSON Sarah * ODOE

Subject: Comments on Perennial's Site Retirement Plan and Request to Terminate Site Certificate
Attachments: 2022.8.26 Columbia Riverkeeper's Comments Perennial Termination.docx.pdf

From: Miles Johnson <miles@columbiariverkeeper.org>

Sent: Friday, August 26, 2022 2:59 PM

To: ESTERSON Sarah * ODOE <Sarah.ESTERSON@energy.oregon.gov>

Subject: Comments on Perennial's Site Retirement Plan and Request to Terminate Site Certificate

Sarah,

Attached please find comments from Columbia Riverkeeper on Perennial's Site Retirement Plan and Request to Terminate Site Certificate.

Thank you,
Miles

Miles Johnson (he/him/his) | Senior Attorney | [Columbia Riverkeeper](#) | PO Box 950, Hood River, OR 97031 | phone: 541.490.0487

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P.O. Box 950
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phone 541.387.3030
www.columbiariverkeeper.org

August 26, 2022

Sarah Esterson, Senior Policy Advisor
Oregon Department of Energy
550 Capital Street NE
Salem, OR 97301

Sent via email to: sarah.esterson@energy.oregon.gov

RE: Perennial’s Site Retirement Plan and Request to Terminate Site Certificate

Oregon Department of Energy:

Columbia Riverkeeper submits these comments in response to Perennial-WindChaser LLC’s (Perennial) proposed site retirement plan and application to terminate the site certificate for the Perennial Wind Chaser Station—a fracked gas-fired power plant formerly proposed near Hermiston, Oregon. For the reasons and authorities outlined below, EFSC’s final site retirement plan should require Perennial to remove the access road and bridge that Perennial constructed in violation of the Clean Water Act and various conditions of the site certificate.

As an initial matter, Columbia Riverkeeper incorporates by reference comments submitted by Friends of the Columbia Gorge (Friends) on Perennial’s request to terminate. Specifically, ODOE’s *post hoc* fabrication of a “phased construction” schedule for the Wind Chaser Station has no substantiation in Oregon law, EFSC rules, or Perennial’s site certificate. Any rationale for allowing Perennial to keep the road and bridge that relies on “phased construction” is therefore arbitrary and capricious.

Perennial constructed the road and bridge illegally and likely as a ploy to avoid the expiration of the site certificate’s construction deadline. Perennial violated the Clean Water Act—and site certificate Condition A.4 requiring that construction “compl[y] with all applicable permit requirements of other state agencies”¹—by building the bridge and road without coverage under Oregon DEQ’s construction stormwater general NPDES permit. Further, because Perennial failed to comply with numerous mandatory pre-construction conditions of the site certificate,² any so-called “construction” work purportedly performed on the facility (including on the road and bridge) was illegal. Perennial’s construction of the access road and bridge therefore violated the Clean Water Act and the site certificate.

¹ See also ORS 345-025-0006(3) (establishing mandatory site certification conditions); see also Amendment 1 to the Final Site Certificate, Condition GEN-GS-04(c) (same).

² See generally EFSC, *First Amended Site Certificate*, Section 4.2 (November 22, 2019) (listing pre-construction conditions).

EFSC should discourage illegal behavior from energy companies, like Perennial, by requiring them to remove site improvements made in violation of law or site certificates. Failure to require the removal of such improvements allows energy companies to profit from illegal behavior. Unless EFSC requires Perennial to remove the road and bridge, Perennial will be able to use (or, more likely, sell) a property that has substantially increased in value because it now has vehicle access. To prevent Perennial from realizing a windfall from its illegal activity—and incentivizing other energy companies to engage in similar behavior—EFSC’s site retirement plan should require Perennial to remove the road and bridge.

EFSC has the legal authority to require Perennial to remove the road and bridge. EFSC may modify Perennial’s proposed final retirement plan to comply with the rules of Chapter 345,³ including rules requiring facilities to be retired in a manner that protects the public health, safety, and welfare, as well as protecting Oregon’s environment.⁴ Disincentivizing Perennial, and other energy companies, from knowingly violating environmental laws and site certificates protects the public and environment and, therefore, falls squarely within EFSC’s authority.

EFSC may also require Perennial to remove the road and bridge because the final order on the site certificate discusses removing all improvements upon retirement. Under OAR 345-027-0110(7), EFSC “may . . . modify the [proposed final retirement] plan to comply with . . . applicable conditions in the site certificate.” With respect to retirement, the final order on the site certificate discusses “dismantling and removing equipment and structures”⁵ throughout the site. After agreeing to be bound by the site certificate, Perennial could hardly claim that a retirement plan requiring the removal of the road and bridge is surprising or beyond EFSC’s authority.

Removing the road and bridge would still leave the site in a useful and non-hazardous condition, as envisioned by OAR 345-027-0110(5)(b). Perennial’s core argument for keeping its illegally built road and bridge is that they “are beneficial and necessary to maintain the usefulness of [Perennial]’s privately held property.”⁶ Whatever benefits Perennial hopes to derive from these structures would necessarily be ill-gotten, as discussed above, and EFSC should take steps to prevent Perennial from realizing such benefits. And because Perennial is requesting termination of its site certificate, Perennial cannot use the site for the planned Wind Chaser Facility, so decommissioning the road and bridge will have no effect on the usefulness of the property to Perennial. Accordingly, a final retirement plan that requires removal of the bridge and access road would comply with OAR 345-027-0110(5)(b).

³ OAR 345-027-0110(7).

⁴ OAR 345-026-0005.

⁵ EFSC, *Perennial Wind Chaser Station Final Order*, p. 126 (September 18, 2015).

⁶ Perennial, *Application for Site Certificate Termination*, p. 2 (July 18, 2022).

Perennial's secondary arguments⁷ for keeping the bridge and access road are irrelevant. EFSC's standards for site retirement plans contain no references to the Clean Water Act or local land use permits. Therefore, the fact that Columbia Riverkeeper's litigation eventually forced Perennial into compliance with some terms of Oregon's construction stormwater general NPDES permit, and Perennial subsequently received a coverage termination notice from Oregon DEQ, has no bearing on to EFSC's decision. Similarly irrelevant is Perennial's assertion that it obtained unspecified permits from the Umatilla County Planning Department for the road and bridge. Because EFSC's standards for site retirement do not reference the Clean Water Act or local land use rules, Perennial's purported compliance with those rules has no bearing on whether ESFC should require Perennial to remove its illegally constructed facilities.

Columbia Riverkeeper supports Perennial's request to terminate the site certificate, but EFSC's final site retirement plan should require Perennial to remove the illegally constructed access road and bridge. Letting Perennial keep these facilities would allow the company to reap the "beneficial"⁸ results of flaunting site certificate conditions and the Clean Water Act—and signal to other energy companies that ESFC will reward, rather than punish, such behavior.

Thank you for your attention to this important matter,



Miles Johnson
Senior Attorney
Columbia Riverkeeper

⁷ *See id.*

⁸ *Id.*

ESTERSON Sarah * ODOE

Subject: Comments on Application to Terminate Site Certificate–Perennial Wind Chaser
Attachments: FOCGPerennialTerminationCommentLetter.pdf

From: Hank Shell <hank@gorgefriends.org>
Sent: Monday, August 29, 2022 10:04 AM
To: ESTERSON Sarah * ODOE <Sarah.ESTERSON@energy.oregon.gov>
Cc: Nathan Baker <Nathan@gorgefriends.org>
Subject: Re: Comments on Application to Terminate Site Certificate–Perennial Wind Chaser

Dear Ms. Esterson:

Please find attached Friends of the Columbia Gorge’s written comments on Perennial-WindChaser LLC’s application to terminate the Site Certificate for Perennial Wind Chaser Station.

Best,

Hank Shell

--

Hank Shell, Law Clerk
Friends of the Columbia Gorge
hank@gorgefriends.org
123 NE 3rd Ave., Suite 108



Aug. 29, 2022

Sarah Esterson, Senior Policy Advisor
Oregon Department of Energy
550 Capital Street NW
Salem, OR 97301
Via email only to sarah.esterson@energy.oregon.gov

Re: Application to Terminate Site Certificate for Perennial Wind Chaser Station

Dear Ms. Esterson:

Friends of the Columbia Gorge (“Friends”) has reviewed and submits these comments on the above-referenced application.

Friends is a nonprofit organization with approximately 6,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. Friends’ mission is to vigorously protect the scenic, natural, cultural, and recreational resources of the Columbia River Gorge. We fulfill this mission by ensuring strict implementation of the Columbia River Gorge National Scenic Area Act and other laws protecting the region of the Columbia River Gorge; promoting responsible stewardship of Gorge land, air, and waters; encouraging public ownership of sensitive areas; educating the public about the unique natural values of the Columbia River Gorge and the importance of preserving those values; and working with groups and individuals to accomplish mutual preservation goals.

Friends incorporates herein all claims and arguments raised by Friends and Columbia Riverkeeper in the pending case *Columbia Riverkeeper v. ODOE*, No. 20CV38607 (Mult. Cnty. Cir. Ct. Nov. 2, 2020) (Petition for Judicial Review attached as Exhibit A). Many of these claims and arguments are summarized below.

While the Council has the authority and obligation to issue an order terminating the Site Certificate without any request from Perennial-WindChaser, LLC (“PWC”) based on the issues raised in the Circuit Court case, it is not necessary for the Council to do so here because it now has before it a request to formally terminate the certificate on other grounds—namely, that PWC

has abandoned its plans for the proposed facility and has requested termination of the Site Certificate on that basis. Friends does not oppose the termination of the Site Certificate on those grounds.

1. The Site Certificate expired under its own terms and the applicable law when PWC failed to lawfully commence construction of the Facility prior to the Site Certificate’s construction start deadline.

The Site Certificate expired under its own terms and the applicable law when PWC failed to lawfully commence construction of the Perennial Wind Chaser Station (the “Facility”) prior to the September 23, 2020 construction start deadline specified in the Site Certificate. The Site Certificate has thus been void since September 23, 2020.

If and when a site certificate holder fails to lawfully begin construction of a facility by the construction start deadline specified in the site certificate, the certificate automatically expires on that date. OAR 345-027-0313. The Council is then required to issue an order terminating the Site Certificate. *See* OAR 345-027-0110(9) (“When the Council finds that the site certificate has expired . . . the Council *shall issue an order* terminating the site certificate.”) (emphasis added). “Construction” is a statutorily defined term, meaning “work performed on a site, excluding surveying, exploration or other activities to define or characterize the site, the cost of which exceeds \$250,000.” ORS 469.300(6); *see also* OAR 345-001-0010(12) (same). Here, PWC failed to lawfully begin construction of the Facility by the September 23, 2020 construction start deadline specified in the Site Certificate. The Site Certificate expired on that date for the reasons asserted in *Columbia Riverkeeper v. ODOE*, including the reasons summarized below.

First, ODOE’s purported waiver of numerous pre-construction conditions and requirements of the Site Certificate, including the requirement to obtain an Air Contaminant Discharge Permit from the Oregon Department of Environmental Quality, was an attempted amendment to the Site Certificate. *See* OAR 345-027-0350 (stating that an amendment to a site certificate is required in order to “[d]esign, construct, or operate a facility in a manner different from the description in the site certificate, if the proposed change . . . [c]ould require a new condition *or a change to a condition* in the site certificate.”) (emphasis added). Yet ODOE lacked authority to make these attempted amendments without the approval of the Council. *See* ORS 469.405(1); *Friends of Columbia Gorge v. EFSC*, 365 Or. 371, 394, 446 P.3d 53 (Or. 2019) (citing ORS 469.405(1)) (“The statutes governing the [request for amendment] process *require the council itself to approve an amendment*, thus precluding the council from delegating that final decision-making authority to Staff.”) (emphasis added). Thus, ODOE’s attempted waivers of these conditions were null and void, and the conditions have remained in effect and applicable to the entire Facility at all times.

Second, all pre-construction conditions of the Site Certificate were required to be complied with prior to commencement of construction of the Facility. *See, e.g.*, First Amended Site Certificate at § 4.2 (Nov. 22, 2019) (listing pre-construction conditions and requiring PWC to submit a compliance plan demonstrating compliance with all site certificate conditions prior to beginning construction). Here, **PWC never complied with numerous pre-construction conditions**. Thus, PWC was not authorized to lawfully commence construction of the Facility, and as a result the

Site Certificate expired on the September 23, 2020 construction start deadline and has been void ever since.

2. **The Council never approved “phased construction” of the Facility, and ODOE lacked authority to retroactively approve “phased construction” without oversight and approval by the Council.**

In the erroneous agency orders challenged in the *Columbia Riverkeeper* case, ODOE unlawfully determined that multiple pre-construction conditions of the Perennial Site Certificate, including Conditions GEN-GS-02, GEN-GS-07, and GEN-OE-02, only applied to a so-called “Phase 1” for construction of the Facility, which was purportedly limited to the construction of an access road and bridge on the site. Yet the Site Certificate did not authorize, or even contemplate, any such “phased construction” of the Facility.

Rather, the Council approved a specific construction schedule proposed in the application, and the Site Certificate’s terms and conditions, including its pre-construction conditions, applied to the *entire* Facility as defined by statute, not specific “phases.” *See* ORS 469.300(14) (defining “facility” to include all “related or supporting facilities”); OAR 345-027-0350. ODOE’s retroactive approval of a “phased construction” concept was inconsistent with the terms and conditions of the Site Certificate and would have required approval by the Council. *See* Petition for Judicial Review (Ex. A) at ¶¶ 49, 50, 52, 58.

As noted above, construction of an approved facility in a manner that could require a new or changed certificate condition *requires* an amendment to the certificate, which must be approved by the Council (not by ODOE). *See* OAR 345-027-0350; ORS 469.405(1). Here, by purporting to approve a “phased construction” schedule for the Facility, ODOE unilaterally (and unlawfully) purported to waive numerous pre-construction conditions previously imposed by the Council. But only the Council would have had the power and authority to do that.

In fact, the Multnomah County Circuit Court has already indicated agreement with Friends on this point, noting that ODOE’s attempted unilateral action “functionally adds that only permits required for the specific part of the facility must be obtained before construction may begin. *This language is not included in the Site Certificate and therefore arguably serves as an amendment to the Site Certificate.*” *Columbia Riverkeeper v. ODOE*, No. 20CV38607, Opinion Regarding Respondents’ Motion to Dismiss, at 8 n. 5 (Multnomah Cnty. Cir. Ct. Oct. 20, 2021) (emphasis added) (attached as Exhibit B). With this statement, the Court signaled that Friends is likely to prevail on the merits of our claims that ODOE’s actions were unlawful and that all pre-construction conditions remained applicable to the entire Facility, not just certain “phases” of the Facility.

3. **Because PWC never applied to the Council for a site certificate amendment to extend the September 23, 2020 construction commencement deadline prior to that deadline, the certificate expired on that deadline and is null and void.**

Despite promising to the Council that it would do so, PWC failed to apply to the Council for a site certificate amendment to extend the September 23, 2020 construction commencement

deadline prior to that deadline. As a result, the certificate expired on that deadline and is null and void.

Only the Council, not ODOE, has the authority to adopt conditions in a site certificate to ensure compliance with any applicable statute or regulation. *See* ORS 469.501, .503. Certain conditions are mandatory, meaning the Council must impose them in every site certificate. *See* OAR 345-025-006. A construction commencement deadline is one such mandatory condition; it is expressly required by the Siting Act. ORS 469.370(12) (“The council shall specify in the site certificate a date by which construction of the facility must begin.”); *see also* OAR 345-025-006(4) (“A certificate holder *must* begin and complete construction of the facility by the dates specified in the site certificate.”) (emphasis added).

A certificate holder may extend the construction start deadline for a site certificate *only* by obtaining a site certificate amendment from the Council, and *only* the Council has the authority to amend a site certificate. *See* OAR 345-027-0350(3); ORS 469.405(1) (“A site certificate may be amended with the approval of the Energy Facility Siting Council.”); *see also Friends v. EFSC*, 365 Or. at 394.

The original deadline to commence construction of the Facility was September 23, 2018, as approved by the Council in the original Site Certificate. PWC later sought and obtained approval from the Council to amend the Site Certificate to extend that deadline by two years, to September 23, 2020.

Though it promised at the Council’s regular May 22, 2020, meeting that it would seek another amendment to the Site Certificate to extend the construction start deadline a second time, PWC failed to do so prior to the September 23, 2020 construction start deadline. As a result of PWC’s failures to follow through on its promises, the Site Certificate expired by operation of law and its own terms. First Amended Site Certificate at § 4.1 (Nov. 22, 2019) (requiring PWC to begin construction by September 23, 2020 and to construct the Facility “substantially as described in the site certificate”); OAR 345-027-0313 (“If the certificate holder does not begin construction of the facility by the construction beginning date specified in the site certificate or amended site certificate, *the site certificate expires on the construction beginning date specified*, unless expiration of the site certificate is suspended pending final action by the Council on a request for amendment to a site certificate under OAR 345-027-0385(2).”) (emphasis added). As such, the Council was required to issue an order terminating the Site Certificate. *See* OAR 345-027-0110(9). In summary, the Site Certificate has been expired and void since September 23, 2020.

4. Conclusion

As explained above and by Friends and Columbia Riverkeeper in the pending Circuit Court case, the Site Certificate for this Facility expired on September 23, 2020 and is void. PWC had five years to lawfully commence construction of the Facility, but failed to do so, and also failed to apply for a second extension of the construction commencement deadline.

With that said, Friends does not oppose a Council Order formally terminating the Site Certificate on the grounds that the proposal to construct and operate the Facility has now been formally

abandoned, regardless of the Site Certificate expiration date. Such a Council Order will reach the same practical result as sought in the Circuit Court: termination of the Site Certificate and abandonment of the proposed Facility. For these reasons, Friends does not oppose approval of PWC's application to terminate the Site Certificate.

Sincerely,

A handwritten signature in black ink, appearing to read 'Hank Shell', with a stylized flourish at the end.

Hank Shell
Law Clerk

A handwritten signature in black ink, appearing to read 'Nathan Baker', with a stylized flourish at the end.

Nathan Baker
Senior Staff Attorney

Exhibit A

Petition for Judicial Review

Columbia Riverkeeper v. ODOE,
No. 20CV38607 (Mult. Cnty. Cir. Ct. Nov. 2, 2020)

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

COLUMBIA RIVERKEEPER and
FRIENDS OF THE COLUMBIA
GORGE,

Petitioners,

v.

OREGON DEPARTMENT OF
ENERGY; and PERENNIAL-
WINDCHASER LLC;

Respondents.

)
) Case No. 20CV _____
)
) **PETITION FOR JUDICIAL REVIEW**
)
) (Oregon Administrative Procedures Act,
) ORS ch. 183; Oregon Energy Facility
) Siting Act, ORS ch. 469)
)
) [Filing Fee Authority: ORS 21.135(1),
) (2)(e)]
)
) **NOT SUBJECT TO MANDATORY**
) **ARBITRATION**
)
)
)

INTRODUCTION

1.

This petition is filed pursuant to the Oregon Administrative Procedures Act, ORS Chapter 183, and the Oregon Energy Facility Siting Act, ORS Chapter 469. Petitioners allege that the Oregon Department of Energy (“ODOE” or “Department”) grievously erred when it determined that Perennial-WindChaser LLC (“PWC”) lawfully began construction of the Perennial Wind Chaser Station, an unbuilt gas-fired power plant that would be located in Umatilla County.

PARTIES

2.

Petitioner COLUMBIA RIVERKEEPER (“Riverkeeper”) is a 501(c)(3) nonprofit organization originally registered in the State of Washington and now licensed in both Oregon

1 and Washington, with offices located in Portland, Oregon and Hood River, Oregon.

2 Riverkeeper’s mission is to restore and protect the water quality of the Columbia River and all
3 life connected to it, from the headwaters to the Pacific Ocean. To achieve these objectives,
4 Riverkeeper operates scientific, education, and legal programs aimed at protecting water quality,
5 air quality, public health, climate stability, and habitat in the Columbia River basin. Riverkeeper
6 has over 16,000 members and supporters.

7 3.

8 Petitioner FRIENDS OF THE COLUMBIA GORGE (“Friends”) is a nonprofit Oregon
9 corporation with approximately 6,500 members. Friends’ mission is to vigorously protect the
10 scenic, natural, cultural, and recreational resources of the Columbia River Gorge. Friends fulfills
11 this mission by ensuring strict implementation of the Columbia River Gorge National Scenic Area
12 Act and other laws protecting the region of the Columbia River Gorge; promoting responsible
13 stewardship of Gorge land, air, and waters; encouraging public ownership of sensitive areas;
14 educating the public about the unique natural values of the Columbia River Gorge and the
15 importance of preserving those values; and working with groups and individuals to accomplish
16 mutual preservation goals.

17 4.

18 Respondent OREGON DEPARTMENT OF ENERGY is an agency of the State of Oregon.
19 Pursuant to state law, ODOE provides clerical and staff support to the Oregon Energy Facility
20 Siting Council (“EFSC” or “Council”) in EFSC’s review of applications seeking permission to
21 construct large energy projects throughout the State of Oregon. EFSC-issued permits are called
22 “site certificates” pursuant to state law.

23 5.

24 Respondent PERENNIAL-WINDCHASER, LLC is a limited liability company registered
25 in the State of Delaware. PWC is wholly owned by Perennial Power Holdings, Inc. (“PPH”). PWC
26 is the site certificate holder for the EFSC-issued Site Certificate for the Perennial Wind Chaser
27 Station (“Site Certificate”).

1 13.

2 The initial site certificate issued in 2015 required that PWC commence construction, as
3 that term is defined in ORS 469.300(6), by September 23, 2018.

4 14.

5 On August 2, 2018, PWC submitted a Request for Amendment 1 (“RFA1”) to amend the
6 Site Certificate, including by extending the construction deadlines in the Site Certificate.

7 15.

8 When a site certificate holder seeks an extension of a construction deadline for an unbuilt
9 energy project, EFSC is required to fully review the project as if it were a new proposal and
10 determine whether the project complies with all applicable laws.

11 16.

12 During the RFA1 amendment process, Riverkeeper raised concerns that PWC’s Air
13 Contaminant Discharge Permit (“ACDP”) for the Facility, issued by the Oregon Department of
14 Environmental Quality (“DEQ”), may have expired or would expire soon. On November 22, 2019,
15 EFSC granted the RFA1, thus extending the deadline for PWC to begin construction of the Facility
16 to September 23, 2020. EFSC dismissed Riverkeeper’s concerns, concluding in a Final Order that
17 “even if the Council amends the site certificate to extend the construction commencement date to
18 September 23, 2020, Perennial would not be able to commence facility construction without a
19 valid DEQ permit.”

20 17.

21 Pursuant to OAR 345-027-0313, if PWC failed to lawfully begin construction by
22 September 23, 2020, the Site Certificate would expire and would be deemed terminated by
23 operation of law.

24 18.

25 On May 22, 2020, JJ Jamieson, a representative for PWC, testified to EFSC during an
26 EFSC public meeting that, PWC would be unable to start construction of the Facility by the
27 September 23, 2020 deadline because the COVID-19 pandemic had interfered with its ability to

1 complete certain pre-construction surveys in 2020. Specifically, Mr. Jamieson stated that “[w]e
2 received approval of the amendment to our site certificate last fall, and with that came some
3 specific preconstruction conditions that we had to meet. Among those were some surveys that
4 needed to take place, and these surveys—wildlife and vegetation surveys—have to take place at a
5 very specific time, namely in April” and that “I have to perform [these surveys] at a very specific
6 time of year, so I find myself now that, because of COVID specifically, I can’t complete my pre-
7 construction conditions to start construction on September 23.”

8 19.

9 At the same May 22, 2020 EFSC meeting, Mr. Jamieson also testified that, because PWC
10 could not start construction in 2020, PCW intended to apply for another extension of the
11 construction start deadline for the Facility. Specifically, Mr. Jamieson stated that PWC “would be
12 putting in what we’ve done in the past,” that PWC is “familiar with” this certificate amendment
13 process, that “we know what we need to do to get it done,” and that “we can work through
14 something that’s familiar to us, and find a solution to the impacts that COVID-19 has had on the
15 ability to start construction.”

16 20.

17 On August 6, 2020, Riverkeeper contacted ODOE via phone and email to inquire
18 whether PWC had in fact applied for a second extension of the construction commencement
19 deadline for the Facility. ODOE responded via email that it anticipated PWC would not request
20 such an extension, and that PWC instead would attempt to meet the “applicable” pre-
21 construction conditions in the Site Certificate and commence construction by the September 23,
22 2020 deadline.

23 21.

24 On August 17, 2020, DEQ confirmed in an email to Riverkeeper that PWC’s ACDP for
25 the Facility had expired and that PWC had applied for a new ACDP. DEQ informed Riverkeeper
26 that the agency was not actively drafting a new permit because PWC had indicated it was
27 considering a design change to the facility.

1 22.

2 On August 20, 2020, Riverkeeper sent a letter to ODOE expressing concerns regarding
3 PWC's failures to meet numerous preconstruction conditions of the Site Certificate.

4 23.

5 On September 2, 2020, ODOE served on Riverkeeper a written response to Riverkeeper's
6 August 20, 2020 letter, in which ODOE dismissed the organization's concerns and made
7 numerous statements or findings of fact and what appear to be legal conclusions. In this
8 September 2, 2020 response, ODOE concluded that PWC's newly adopted intentions to attempt
9 construction of the Facility without first complying with numerous pre-construction conditions
10 was consistent with the applicable law and with the Site Certificate itself.

11 24.

12 On September 18, 2020, ODOE served on PWC a letter concluding that all
13 preconstruction conditions "applicable to Phase 1 construction" of the Facility had been satisfied.
14 The letter further indicates that "Phase 1 construction would occur over an approximately 12-
15 week period and includes constructing an approximately 200-foot by 30-foot access road and an
16 access bridge across the Westland Irrigation District canal."

17 25.

18 Neither the Site Certificate nor the First Amended Site Certificate for the Perennial Wind
19 Chaser Station approves a "Phase 1 construction" for the Facility or even contemplates that the
20 Facility would be constructed in phases. Nor do any of EFSC's Final Orders for the Facility
21 approve "phased" construction of the Facility.

22 26.

23 OAR 345-021-0010(1)(b)(F) requires applicants for site certificates to submit a
24 construction schedule as part of its application. Exhibit B to PWC's 2014 site certificate
25 application indicates that "[t]he construction duration for the Station is expected to be 22 months,
26 from mobilization to commencement of commercial operation The first two months of
27 construction activities will comprise site preparation and grading work. Then, construction for

1 Unit 1 through Unit 4 will continue for the next 16 months until the units are ready to be
2 commissioned . . .” This proposed construction schedule was approved by EFSC in 2015.

3 27.

4 In RFA1, PWC indicated that no changes were proposed with respect to the construction
5 schedule included in its 2014 site certificate application and approved in 2015.

6 28.

7 Pursuant to OAR 345-021-0006(10), all representations made in a site certificate
8 application and supporting record are deemed to be binding commitments made by an applicant.

9 29.

10 Pursuant to ORS 469.401(3), the terms and conditions of the Site Certificate and the First
11 Amended Site Certificate for the Perennial Wind Chaser Station are binding on all Respondents
12 “as to the approval of the site and construction and operation of the facility.”

13 30.

14 Pursuant to OAR 345-025-0006(1), a certificate holder “must design, construct, operate
15 and retire the facility: (a) Substantially as described in the site certificate, (b) In compliance with
16 the requirements of ORS Chapter 469, applicable Council rules, and applicable state and local
17 laws, rules and ordinances in effect at the time the site certificate is issued; and (c) in compliance
18 with all applicable permit requirements of other state agencies.”

19 31.

20 Pursuant to OAR 345-025-0006(1), the “Council may not change the conditions of the site
21 certificate except as provided for in OAR Chapter 345, division 27.”

22 32.

23 Pursuant to OAR 345-027-0350(4)(c), “an amendment to a site certificate is required to . .
24 . [d]esign, construct, or operate a facility in a manner different from the description in the site
25 certificate, if the proposed change . . . [c]ould require a new condition or a change to a condition
26 in the site certificate.”

27 ////

1 33.

2 ORS 469.402, provides that if the Council elects to “impose conditions on a site certificate
3 or an amended site certificate . . . that require subsequent review and approval of a future action,”
4 that review may be expressly delegated to ODOE by the Council if the Council determines such
5 delegation is warranted under the circumstances of the case.

6 34.

7 Upon information and belief, Council did not delegate to ODOE the authority to review or
8 approve changes to the approved construction schedule for the Facility, to waive conditions of the
9 Site Certificate, or to make any determinations regarding which pre-construction conditions are
10 “applicable” to purported “phases” of construction.

11 35.

12 The term “construction” is defined in the Site Certificate and by ORS 469.300(6) as
13 “work performed on a site, excluding surveying, exploration or other activities to define or
14 characterize the site, the cost of which exceeds \$250,000.” Thus, unless and until at least
15 \$250,000 worth of physical work has been performed at a site, “construction” has not
16 commenced.

17 36.

18 Upon information and belief, PWC failed to perform or cause physical on-site work
19 building the Facility worth more than \$250,000 prior to the September 23, 2020 construction
20 start deadline.

21 37.

22 Additionally, the Site Certificate contains numerous conditions of approval, including
23 numerous conditions that, by their own terms and pursuant to the applicable law, were required
24 to be satisfied prior to beginning construction of the Facility. The term “facility” as used in the
25 Site Certificate is defined by the Site Certificate itself (and by the applicable law) as “an energy
26 facility together with any related or supporting facilities.”

27 ////

1 38.

2 Prior to the September 23, 2020, deadline to begin construction of the Facility, PWC failed
3 to comply with numerous conditions of approval of the Site Certificate that, by their own terms
4 and pursuant to the applicable law, were required to be satisfied prior to commencing construction
5 of the Facility. Thus, even if PWC performed or caused more than \$250,000 of physical on-site
6 work building the Facility prior to September 23, 2020 deadline, it still failed to lawfully
7 commence construction.

8 39.

9 PWC failed to lawfully commence construction of the Facility by the September 23,
10 2020, construction start deadline.

11 40.

12 PWC also failed, prior to the September 23, 2020, construction start deadline, to submit to
13 EFSC a request to amend the Site Certificate to extend the construction start deadline for a second
14 time. If PWC had submitted such a request, EFSC would have been required to again review the
15 Facility for current compliance with the applicable law, and the public, including Petitioners,
16 would have been allowed to participated in that review process, for example by submitting written
17 comments, by attending any public hearings held, and by formally requesting that EFSC conduct
18 a contested case proceeding in order to resolve the Facility's current compliance with the
19 applicable law.

20 41.

21 Although it has been more than six years since the Facility was first applied for, upon
22 information and belief, PWC has never secured any buyer(s) for the power that would be produced
23 by the Facility.

24 **THE AGENCY ORDERS AT ISSUE**

25 42.

26 This appeal challenges three final agency Orders issued by ODOE, one issued on
27 September 2, 2020; one on September 18, 2020; and one on September 21, 2020.

1 43.

2 On September 2, 2020, ODOE issued and served upon a representative of Riverkeeper an
3 Order entitled “Response to Letter Dated August 20, 2020.” In this Order, ODOE interpreted the
4 applicability of the pre-construction conditions of PWC’s site certificate. Specifically, contrary to
5 the plain language of the Site Certificate, ODOE determined that PWC must only “meet the pre-
6 construction requirements applicable to the part of the facility to be constructed” (emphasis in
7 original).

8 44.

9 In the September 2, 2020 Order, ODOE also misinterpreted the plain language in OAR
10 345-025-0006(5). That regulatory provision prohibits a certificate holder from beginning
11 construction or creating “a clearing on any part of a site until the certificate holder has
12 construction rights on all parts of the site. For the purpose of this rule, ‘construction rights’
13 means the legal right to engage in construction activities.” Despite the clear definition of
14 “construction rights” within the rule, ODOE in its September 2, 2020, Order unlawfully
15 redefined and narrowed the term “construction rights” to mean solely that “the certificate holder
16 has ownership rights or lease rights” to the site.

17 45.

18 PWC does not have an ACDP from DEQ. Pursuant to OAR 340-216-0020(3), “[n]o
19 person may construct, install, establish, develop or operate any air contaminant source . . .
20 without first obtaining an [ACDP] from DEQ” Thus, PWC does not have a legal right to
21 construct the emitting portion of the Facility. Pursuant to OAR 345-025-0006(5), PWC was
22 prohibited from creating a clearing “on any part of the site” because it did not have the legal right
23 to construct all parts of the site.

24 46.

25 The “Phase 1” construction concept was neither proposed by PWC in the initial application
26 for the Site Certificate, nor proposed in its subsequent request for an amendment to the Site
27 Certificate. Nor was the “Phase 1” construction concept referenced in or approved by the Site

1 Certificate, EFSC's amendment thereto, or any of EFSC's Final Orders regarding the Facility.

2 47.

3 Upon information and belief, EFSC has not delegated to ODOE the authority to review
4 and approve changes to PWC's construction schedule or the applicability of the preconstruction
5 conditions. Nor has PWC prepared a written evaluation, as required by OAR 345-027-0355,
6 explaining why these changes do not require a site certificate amendment.

7 48.

8 On September 18, 2020, ODOE issued and served upon representatives for PPH and
9 PWC a Final Order entitled "Preconstruction Compliance Evaluation for Perennial Wind Chaser
10 Station Site Certificate." This Order acknowledges the receipt of and evaluates "several
11 compliance submittals from June 23, 2020 through September 18, 2020, for general and
12 preconstruction site certificate conditions imposed in the amended Perennial Wind Chaser site
13 certificate." The Order purports to confirm "that Perennial has provided sufficient information to
14 satisfy all preconstruction condition requirements applicable to Phase 1." The Order includes an
15 Attachment 1, in which ODOE evaluated numerous conditions of the Site Certificate and
16 determined whether each condition had or had not been met. In Attachment 1, ODOE also
17 purported to waive compliance with numerous pre-construction conditions as "not applicable to
18 Phase 1."

19 49.

20 One of the Site Certification conditions ODOE deemed satisfied in the September 18,
21 2020, Order was GEN-OE-02. That condition states that "[t]he certificate holder shall obtain all
22 necessary federal, state and local permits or approvals required for construction, operation and
23 retirement of the facility." ODOE deemed this condition satisfied even though PWC does not
24 have a construction stormwater permit from DEQ, as required by state and federal law and
25 condition CON-SP-01 of the Site Certificate.

26 50.

27 Also in the September 18, 2020, Order, ODOE indicates that the restoration bond or letter

1 of credit required by Conditions PRE-RT-01 and PRE-RT-02 had been “adjusted to reflect Phase
2 1.” This purported adjustment by ODOE was in direct violation of Condition PRE-RT-02, which
3 indicates a specific amount that is to be paid for the initial bond or letter of credit and expressly
4 states that any revision to the restoration costs “would need to be reviewed and approved by the
5 Council through a site certificate amendment.”

6 51.

7 On September 21, 2020, ODOE issued and served upon representatives of PWC and/or
8 PPH a Final Order entitled “Commencement of Perennial Wind Chaser Station Phase 1
9 Construction.” This Order purported to confirm that the Site Certificate had been “activated.”

10 52.

11 Neither the Site Certificate, nor the applicable law, discusses or authorizes any concept of
12 “activating” this Site Certificate or any other site certificate.

13 53.

14 On September 24, 2020, ODOE informed a Riverkeeper representative via email that
15 PWC began construction on September 21, 2020.

16 **THE NATURE OF THE PETITIONERS’ INTERESTS**

17 54.

18 Petitioners have significant interests in whether Respondent ODOE is lawfully and
19 correctly implementing state statutes and rules governing energy siting and administrative
20 procedures; whether construction of the Facility has lawfully commenced; whether the Site
21 Certificate has expired; whether the Facility is actually under construction; and whether it will be
22 fully built and operated.

23 55.

24 Petitioners have significant interest in reducing climate change impacts within the State
25 of Oregon. If constructed, the Facility would be one of the largest stationary sources of
26 greenhouse gas emissions within the state. By declining to apply for a site certificate amendment
27 to extend the construction start deadline for the Facility, PWC avoided application of EFSC’s

1 recently revised carbon monetary offset rate. If ODOE's decisions are allowed to stand, this will
2 result in a significant cost savings to PWC and greater impacts to the environment.

3 56.

4 Petitioners have significant interests in the protection and enhancement of the natural,
5 scenic, recreational, and cultural resources threatened by this Facility. Petitioners have invested
6 time and important resources into trying to protect these resources from impacts such as those that
7 would be created by this Facility. Petitioners' members and staff regularly lead and participate in
8 recreational activities in the areas affected by this Facility, and intend to continue these activities.
9 These activities include hiking, running, walking, bicycling, horseback riding, rock climbing,
10 swimming, boating, river rafting, kayaking, canoeing, fishing, the viewing of salmon and other
11 fish and wildlife, birdwatching, botanical identification, the viewing of cultural resources, general
12 sightseeing, and quiet enjoyment.

13 **ADVERSE EFFECTS ON PETITIONERS**

14 57.

15 Petitioners are adversely affected or aggrieved by ODOE's Orders in multiple ways. ODOE
16 unlawfully purported to waive numerous preconstruction conditions for the Facility and incorrectly
17 concluded that construction of the Facility was lawfully commenced. ODOE's determinations
18 violate the applicable law and the language of the Site Certificate. As a result of these
19 determinations, ODOE has effectively given PWC at least three additional years to construct the
20 Facility than would otherwise have been allowed. Moreover, ODOE has unlawfully allowed PWC
21 to bypass the required procedures for extending a construction start deadline for a project. Had
22 those required procedures been followed here, EFSC would have been required to evaluate the
23 Facility's current compliance with applicable law (including the revised carbon offset rate), and
24 the public at large, including Petitioners, would have been allowed to participate in EFSC's
25 decision-making processes and affect the result. ODOE's Orders, including the erroneous legal
26 interpretations contained therein, adversely affect or aggrieve Petitioners' interests in ensuring the
27 protection of resources.

**THE GROUNDS UPON WHICH PETITIONERS CONTEND THE
AGENCY ORDERS SHOULD BE REVERSED OR REMANDED
CLAIM FOR RELIEF
(Violations of Oregon Administrative Procedures Act
and Oregon Energy Facility Siting Act)**

58.

In issuing each or all of the three challenged Orders, ODOE acted in violation of the Oregon Administrative Procedures Act and the Oregon Energy Facility Siting Act. ODOE did so by (1) erroneously interpreting one or more provisions of law; (2) acting outside the range of discretion delegated to the agency by law; (3) acting inconsistent with one or more agency rules, officially stated agency positions, and/or prior agency practices without explaining the inconsistencies; (4) acting in violation of a statutory provision; and/or (5) issuing agency orders not supported by substantial evidence, in one or more of the following ways:

(a) By erroneously determining that construction of the Facility was lawfully commenced prior to the construction start deadline of September 23, 2020;

(b) By erroneously determining that one or more of the mandatory pre-construction conditions of the Site Certificate were not applicable or satisfied by PWC prior to the construction start deadline of September 23, 2020, including, but not limited to, Conditions PRE-OE-02, PRE-OE-03, PRE-SS-01; PRE-SS-02, PRE-SS-03, PRE-SS-04, PRE-SP-01, PRE-RT-01, PRE-RT-02, PRE-FW-01, PRE-FW-02, PRE-FW-03, PRE-FW-05; PRE-FW-06; PRE-TE-01; PRE-TE-02; PRE-TE-03; PRE-TE-04; PRE-TE-05; PRE-HC-01; PRE-HC-02; PRE-PS-02; PRE-PS-03; PRE-PS-04; PRE-NC-01, PRE-GW-01; PRE-CD-01, PRE-CD-02, PRE-CD-03; PRE-CD-04; PRE-CD-05; PRE-CD-06; and/or PRE-CD-07.

(c) By erroneously determining that one or more of the mandatory general conditions of the Site Certificate were not applicable or were satisfied by PWC including, but not limited to, Conditions GEN-GS-02, GEN-GS-07, and/or GEN-OE-02;

(d) By erroneously determining that one or more of the mandatory construction conditions of the Site Certificate were not applicable or were satisfied by PWC including, but not limited to, Condition CON-SP-01;

1 (e) By unlawfully waiving or purporting to waive binding conditions of the Site
2 Certificate;

3 (f) By authorizing PWC to begin construction of the Facility and/or create a clearing
4 on a portion of the Facility site without first obtaining construction rights on all parts of the site,
5 in violation of OAR 345-025-0006(5);

6 (g) By authorizing PWC to begin construction in a manner inconsistent with the
7 mandatory requirements of OAR 345-025-0006(8) prior to the construction start deadline of
8 September 23, 2020;

9 (h) By unlawfully authorizing an amendment to the bond or letter of credit requirement
10 established by EFSC;

11 (i) By unlawfully authorizing amendments to the construction schedule previously
12 specified in PWC's application for a site certificate and previously approved by EFSC in the Site
13 Certificate and/or by EFSC's Final Orders for the Facility without following the procedures
14 required by law;

15 (j) By unlawfully extending the deadline to commence construction of the Facility
16 outside of and in violation of the required decision-making procedures for amending a site
17 certificate;

18 (k) By erroneously concluding that PWC performed more than \$250,000 worth of
19 physical on-site work to build the Facility prior to the construction start deadline of September 23,
20 2020;

21 (l) By failing to determine that the Site Certificate has expired and must be terminated;

22 (m) By violating ORS 469.370(12) and the Oregon Legislature's expressly stated
23 legislative intent to prohibit "lengthy site banking" of sites for EFSC-approved energy facilities;

24 (n) By erroneously determining that the Site Certificate has been "activated";

25 (o) By allowing further on-site work and/or construction activities for the Facility to
26 continue, and/or by allowing the subsequent operation of the Facility; and

1 (p) By acting in ways as yet unknown to Petitioners that violated the applicable
2 statutes, rules, Site Certificate, and/or EFSC Final Orders.

3 59.

4 Pursuant to ORS 183.497, Petitioners request an award of reasonable attorney fees and
5 costs incurred in this matter.

6 **REQUESTED RELIEF**

7 WHEREFORE, Petitioners request that this Court, exercising its authority under ORS
8 183.480, 183.484, 183.486, 183.497, and 469.563,

9 1. Declare that, in issuing the challenged Orders, ODOE (1) erroneously interpreted
10 one or more provisions of law; (2) acted outside the range of discretion delegated to the agency by
11 law; (3) acted inconsistent with one or more agency rules, officially stated agency positions, and/or
12 prior agency practices without explaining the inconsistencies; (4) acted in violation of a statutory
13 provision; and/or (5) issued agency Orders not supported by substantial evidence;

14 2. Set aside and reverse or remand each or all of the challenged Orders;

15 3. Declare that the Site Certificate for this Facility has expired and is terminated,
16 pursuant to OAR 345-027-0313;

17 4. Restrain and enjoin the construction and operation of the Facility without a new
18 EFSC-issued site certificate;

19 5. Award Petitioners their reasonable attorney fees and costs; and

20 6. Award Petitioners such other relief as the Court deems just and equitable.

21 DATED: November 2, 2020

22 CRAG LAW CENTER

23 */s/ Maura C. Fahey*

24 Maura C. Fahey, OSB #133549

25 Email: maura@crag.org

26 Attorney for Petitioners and Trial Attorney

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Exhibit B

Opinion Regarding Respondents' Motion to Dismiss

Columbia Riverkeeper v. ODOE,
No. 20CV38607 (Multnomah Cnty. Cir. Ct. Oct. 20, 2021)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

COLUMBIA RIVERKEEPER, and)
FRIENDS OF THE COLUMBIA GORGE,)
)
Petitioners,)
)
v.)
)
OREGON DEPARTMENT OF ENERGY,)
and PERENNIAL WIND CHASER, LLC,)
)
Respondents.)
)

Case No: 20CV38607

OPINION REGARDING
RESPONDENTS' MOTION TO
DISMISS

FILED
21 OCT 22 PM 12:08
4TH JUDICIAL DIST

The parties appeared via videoconference on June 4, 2021, on Respondents' Motions to Dismiss. Erin Saylor, Karl Anuta and Maura Fahey appeared for Petitioners. Richard Allan appeared for Perennial Wind Chaser ("PWC") and Sadie Forzley and Abigail Fallon appeared for the Oregon Department of Energy ("ODOE"). The Court invited the parties to submit supplemental briefing on Petitioners' argument that this Court has jurisdiction to review non-final orders under ORS 469.563 if the agency is proceeding without probable cause. See ORS 183.480(3). ODOE submitted its supplemental brief on June 18, 2021. Petitioners filed their brief on June 25, 2021. Respondents' motions to dismiss are based on two main contentions. First, Respondents assert that letters authored by ODOE on September 2, 2020 and September 18, 2020 were not final orders and thus not subject to judicial review. Second, Respondents assert that Petitioners lack standing to bring this action. After considering the submissions and arguments of the parties, the Court grants the motions to dismiss as to the September 2, 2020 letter from the ODOE to Petitioner Columbia Riverkeeper but otherwise denies Respondents' motions to dismiss.

Subject matter jurisdiction arguments

Procedural history

The PWC facility's original site certificate was effective September 23, 2015. Forzley Decl., Ex.A. The original site certificate required that construction on the facility begin within three years of the effective date of the site certificate, September 23, 2018. *Id.* When Respondents realized that beginning construction by September 23, 2018 would not be possible, Respondents applied to the Oregon Energy Facility Siting Council ("EFSC") for a two-year extension on the construction deadline. *Id.* In the summer of 2019, Petitioners provided written comments to EFSC during the public hearing phase of its decision to extend the construction deadline. Goldberg Decl. ¶ 9. In November 2019, Petitioners requested EFSC hold a contested case hearing on its proposed order to extend the deadline, EFSC denied this request. *Id.* at ¶ 10. On November 22, 2019, EFSC issued an amended site certificate which extended the construction deadline to September 23, 2020.

Petitioners seek judicial review of what they assert are three final Orders purportedly issued by ODOE on September 2, 2020, September 18, 2020 and September 21, 2020. Respondents move to dismiss review of the September 2nd and September 18th letters asserting that the Court lacks subject matter jurisdiction because these two letters are not final orders as defined in ORS 183.310(6)(b). Preliminary or tentative agency declarations or statements are not final if they either precede final agency action or do not preclude further agency consideration of the subject matter of the declaration or statement. As the Court explained in *Grobovsky, M.D. v. Board of Medical Examiners*, 213 Or App 136, 143 (2007), "a final order expresses final agency action and is in writing. A final order is neither tentative nor preliminary but is a complete statement of the agency's decision on the matter before it."

September 2, 2020 letter

Petitioner wrote ODOE on August 20, 2020, alleging that PWC failed to meet some of the site certificate's preconstruction conditions arguing primarily that:

- 1) Building a \$250,000.00 access road does not count as beginning construction with respect to the construction deadline provisions of the site certificate, and
- 2) PWC failed to obtain every permit and approval necessary to build every aspect of the facility before starting construction on any part of the site. Petitioner argued that since Perennial did not have an air emissions permit from the Oregon Department of Environmental Quality (DEQ), it did not have construction rights on all parts of the site and thus could not begin construction per OAR 345-025-0006(5).

On September 2, 2020, ODOE sent a response letter to Petitioner Columbia Riverkeeper and courtesy copied PWC. Forzley Decl., Ex. C. The letter outlined ODOE's interpretation of applicable administrative rules and ORS 469.300. The response included a statement that "if a certificate holder demonstrates to the Department that the cost of the work performed to construct part of a facility exceeds \$250,000, the construction commencement condition would be satisfied." ODOE explained that, "it is not necessary to meet all pre-construction requirements before beginning work on any part of a facility, such as the road and bridge Perennial will construct. Rather it is only necessary to meet the pre-construction requirements applicable to the part of the facility to be constructed." (emphasis in original).

Furthermore, ODOE explained that PWC is not required to acquire an Air Contaminant Discharge permit before commencement of construction, "DEQ's Air Contaminant Discharge Permit is not a 'construction right' as defined in OAE 345-025-0006(5) because it is not a 'legal

right to engage in construction activities,’ rather it is a permit used to regulate sources of air contaminant emissions.”

September 18, 2020 letter

On September 18, 2020, ODOE sent a letter to Perennial Power Holdings, Inc., regarding ODOE’s “Preconstruction Compliance Evaluation for Perennial Wind Chaser Station Site Certificate.” The letter confirmed that ODOE had received Perennial’s summary of how it had purportedly met the preconstruction site certificate conditions applicable to Phase 1 of the project and contained the following statement, “Based upon the Department’s review of this summary and the attachments referenced in that summary, the Department confirms that Perennial has provided sufficient information to satisfy all preconstruction condition requirements applicable to Phase 1.” Forzley Decl., Ex. D.

September 21, 2020 letter

This letter was also addressed to Perennial Power Holdings, Inc. Respondents concede that this letter constitutes a final order. ODOE writes that because “construction commenced prior to the September 23, 2020 construction commencement deadline, the Department confirms that the site certificate has been activated.” Forzley Decl., Ex. E. Importantly, this letter also includes the following statement justifying the determination that the site certificate had been activated: “[I]nformation and materials submitted by the certificate holder for general and preconstruction conditions applicable to Phase I have been reviewed by the Department and determined sufficient to satisfy the requirements, as stated in our September 18, 2020 letter.” *Id.*

Discussion

In seeking judicial review of the September 2 and 18 letters, Petitioners rely on *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663 (1996), a case in which the Court

considered whether a particular letter in a series of written communication should be considered a final order. The Court noted that the question of whether a letter dated December 18, 1991, was a final order begs the question, “final as to what?” *Id.* at 676. The Court also considered the context in which the letter was written. *Id.* Ultimately, the Court held that one paragraph of the December 18 letter was final because it precluded further agency consideration of water use under the terms of an existing permit, while other paragraphs related to the Petitioner’s rights under proposed future certificates. *Id.* at 677.

Petitioner correctly points out that *Teel* stands for the proposition that an agency order may be final as to some issues and not others. With respect to section 2 of the September 2, 2020 letter, Petitioner argues that ODOE’s determination that DEQ’s Air Contaminant Discharge Permit is not a construction right was a final order because the decision cleared the way for Perennial to commence construction. Petitioner is incorrect. ODOE’s statement that a DEQ Air Contaminant Discharge Permit is not a construction right as defined in OAR 345-025-0006(5) was not a final order because it did not preclude further agency consideration of the subject matter. ORS 183.310(6)(b)(B). When considering the context of the letter, which was not addressed to Perennial and which was not a final determination that all preconstruction conditions requirements were satisfied, this letter from ODOE to Petitioner is nothing more than an attempt to provide a detailed response to a letter of concern from an advocacy organization.

The content of the subsequent September 18, 2020 letter supports the conclusion that the September 2nd letter was not a final order. ODOE, while communicating directly to Perennial, states that the Department “**confirms** that Perennial has provided sufficient information to satisfy all preconstruction condition requirements.” (emphasis added). A confirmation that all preconstruction conditions submitted pursuant to OAR 345-026-0048 were satisfied is an

expression that the agency necessarily, while considering the ultimate question of preconditions, also considered whether the absence of a DEQ Air Quality Discharge Permit was a failure to obtain a necessary construction right. Thus, the September 2nd letter was not a final order.¹²

Conversely, the September 18 letter was a final order subject to judicial review on the important issue of whether preconstruction conditions were met clearing the way for construction commencement. This finding is bolstered by the context provided by the subsequent letter to Perennial on September 21, 2020, in which ODOE reiterates that prior agency review of materials in support of preconstruction conditions took place days earlier which the agency “determined [were] sufficient to satisfy the requirements, as stated in our September 18, 2020 letter.” Forzley Decl., Ex. E. Of course, the purpose of the September 21 letter was to confirm that the site certificate had been activated, which could only legally occur if preconditions requirements were satisfied (September 18 letter) and if construction commenced before the deadline of September 23, 2020.

The Court notes that whether only one final order is reviewable (September 21 letter) or two final orders are reviewable (September 18 and September 21 letters), the Circuit Court may review the ODOE’s ultimate determination that the site certificate was properly and legally

¹ The portion of the September 2, 2020 letter dealing with the issue of whether building a \$250,000.00 access road counts as beginning construction with respect to the construction deadline provisions of the site certificate was also not a final order. ODOE dealt with this issue with finality when it issued the September 21, 2020 letter stating that “Phase I construction * * * includes constructing an approximately 200-foot by 30-foot access road and an access bridge across the Westland Irrigation District canal.”

² By holding that the September 2, 2020 letter is not a final order subject to judicial review, it does not follow that the letter cannot be considered when reviewing the subsequent final orders. ODOE’s detailed position outlined in the initial correspondence can certainly be examined in determining the legality of the later statements that preconstruction condition requirements were satisfied and that commencement of construction occurs upon the expenditure of \$250,000.00 to build an access road and bridge.

activated by the September 23, 2020 deadline. This review will necessarily include review of the issues raised by Petitioners. That is because the issues of precondition requirements and construction commencement are necessarily part of the ultimate decision that the site certificate was properly activated.³

Standing arguments

Respondents also move to dismiss for lack of standing claiming Petitioners are not adversely affected or aggrieved by ODOE’s final orders. ORS 183.480(1) provides, “any person adversely affected or aggrieved by an order [...] is entitled to judicial review of a final order.” The statute does not define “adversely affected” or “aggrieved.” The Court ultimately provided clarification on the meaning of “aggrieved” in *People for the Ethical Treatment of Animals v. Instit. Animal Care & Use Committee*, 312 Or 95 (1991), stating that a person is aggrieved if, “(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action, (2) the person seeks to further an interest that the legislature expressly wished to have considered, or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding.” *Id.* at 101-102 (internal citations omitted). Petitioners allege standing based on “preclusion of Petitioners’ ability to participate in the proper public processes required by law before EFSC for a site certificate amendment,” which jeopardizes Petitioners’ separate interests in the resources and recreation in the Colombia Gorge.⁴ Petitioners’ Opposition to Motions to Dismiss, 12-13. Petitioners argue

³ Petitioners further argue that the Court may also review the September 18, 2020 letter based on an allegation that the ODOE acted without probable cause. ORS 183.480(3). Respondents raise several arguments in supplemental briefing for why a probable cause review is improper in the context of this case. The Court declines to address the issues raised as it is unnecessary to do so given the Court’s ruling that the September 18 letter is subject to review as a final order.

⁴ Petitioners also allege standing based on the direct harms to the natural resources protected by Petitioners, loss of funds to The Climate Trust, or alternatively that Petitioners seek to further an

that ODOE's orders functionally amend the Site Certificate⁵ and had the Site Certificate been properly amended by the EFSC, Petitioners would have been afforded their procedural right to participate. This Court is not aware of any Oregon court that has addressed whether "aggrieved" under ORS 183.480 includes harm to procedural rights such as the right to public participation. However, the United States Supreme Court has decided similar issues surrounding the same language of "adversely affected or aggrieved" under the federal Administrative Procedure Act (APA). 5 U.S.C. § 702. In doing so, the Supreme Court noted that there is "much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572

interest the Legislature expressly wished to have considered. Additionally, on September 27, 2021, Petitioners filed Notice of Supplemental Authority arguing that the recent enactment of HB 2021, effectively prohibits the EFSC from issuing a site certificate for proposed fossil fuel power plants such as the one subject to this litigation. These arguments only provide a basis for standing to the extent they give context to the procedural standing argument made by Petitioners. That is to say, the procedural right to public participation is important precisely because participation from the public is a fundamentally important mechanism for enforcing rights and furthering interests.

⁵ ODOE's letter claim that the air emissions permit from Department of Environmental Quality is not required under OAR 345-025-006(5) to meet a "construction right;" however, the Amended Site Certificate states: "This remains true — even if the Council amends the site certificate to extend the construction commencement date to September 23, 2020, Perennial would not be able to commence facility construction without a valid DEQ permit." Forzley Decl., Ex A. "Condition B.6: The certificate holder shall obtain all necessary federal, state and local permits or approvals required for construction, operation and retirement of the facility or ensure that its contractors obtain the necessary federal, state and local permits or approvals. Condition B.7: Before beginning construction, the certificate holder shall provide confirmation in writing to the department that the third parties have obtained all necessary permits or approvals and shall provide to the department proof of agreements between the certificate holder and the third parties regarding access to the resources or services secured by the permits or approvals." Forzley Decl., Ex. B. The final order by ODOE functionally adds that only the permits required for the specific part of the facility must be obtained before construction on that part may begin. This language is not included in the Site Certificate and therefore arguably serves as an amendment to the Site Certificate.

n.7 (1992). The Supreme Court has recognized procedural injuries are a harm and will only deny standing on a procedural injury when harmless error results, *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009), or on Article III requirements of redressability, *Lujan*, 504 U.S at 572. More specifically, the Supreme Court has found that an injury to the right to provide commentary prior to an agency action is a procedural injury sufficient to provide standing, provided that failure to allow for public comment jeopardizes a separate concrete interest. *Summers v. Earth Island Instit.*, 129 S.Ct. 1142, 1151 (2009). The relevant standard for reviewing standing rests on whether the failure to provide the procedural right jeopardizes a separate concrete interest of the Petitioners. *Id.* In addition to the Supreme Court of the United States, the D.C. Circuit Court has addressed the issue and held that a procedural injury is sufficient to establish standing so long as it protects a separate concrete interest.⁶ The Court finds the interpretation of the Supreme Court of the United States that “any person adversely affected or aggrieved” to include a person who has had an injury to their procedural right persuasive. The Court finds that this interpretation to be consistent with the decision in *PETA.*, as that case involved an organization that claimed to be aggrieved by the agency’s final decision after having the opportunity to participate in the public hearing process. *PETA*, 312 Or at 99. The Supreme Court noted, the act at issue “specifically provides for representation of the public interest through the very committee whose decision PETA disputes.” *Id.* (citing Court of Appeals decision in *People for the Ethical Treatment of Animals v. Instit. Animal Care & Use Committee* 102 Or.App. 276, 794 P.2d 1224 (1990)). The Court finds that an injury to a procedural right that jeopardizes a separate concrete interest is an injury to a substantial interest consistent with the first prong of the *PETA* analysis.

⁶ *Electric Power Supply Ass’n v. FERC*, 391 F. 3d 1255, 1261-1262 (2004); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C.Cir.1999); *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664 (D.C.Cir.1996).

In this case, Petitioners standing rests on the allegation that ODOE amended the final decision of ESFC without allowing Petitioners their opportunity to be heard and protect their interests.

Petitioners claim that the functional amendment to the Site Certificate by ODOE eliminated their opportunity to be heard before EFSC. Petitioners were seeking to protect their separate concrete interests in the resources and recreation in the Colombia Gorge, as well as protection of the climate. In this case, the procedural right existed to protect the interests of the Petitioners and the loss of their opportunity to be heard creates a credible threat to Petitioners' separate interests. Thus, Petitioners have standing to challenge ODOE's final orders as it denied Petitioners their right to be heard before ESFC for amendments to the Site Certificate.

For all of these reasons, Respondents' Motions to Dismiss as to the September 2, 2020 letter is granted. Otherwise, the motions are denied. Petitioners shall prepare a proper form of Order consistent with, and referencing, this Opinion.

DATED this 21st day of October, 2021.



Michael A. Greenlick
Circuit Court Judge



24 Waterway Avenue, Suite 740
The Woodlands, TX 77380

September 6, 2022

Sarah Esterson
Senior Policy Advisor
5505 Capitol St. NE
Salem, OR 97301

Dear Ms. Esterson:

On July 18, 2022, Perennial Power Holdings, Inc. (“PPH” or “Perennial”) submitted its termination request for Perennial Wind Chaser Station’s (“PWC”) Site Certificate. Perennial appreciates the opportunity to respond to two public comments received: the August 26, 2022 Columbia Riverkeeper (“Riverkeeper Comment”) and the August 29, 2022 Friends of the Columbia Gorge (“Friends Comment”).

Perennial complied with all applicable environmental laws at the PWC site in Hermiston, including its construction of an access road and a professionally engineered bridge on PWC’s private property. Under the guidance and authority of the Oregon Department of Energy (“ODOE”) and other state and local authorities, both road and bridge were engineered, approved, and constructed to strict specifications. There have been no reported issues on structural integrity or engineering methods. Perennial also obtained the applicable permits from the Umatilla County Department of Land Use Planning.

Perennial is taking the environmentally prudent decision to retire the site to “a useful, non-hazardous condition” by recommending the already-built road and bridge remain, in order to minimize the impact to “fish, wildlife and the environment [] during the retirement process.” § 5(b). Perennial has already demonstrated that the site has been restored to a useful, non-hazardous condition, which the Oregon Department of Environmental Quality (“DEQ”) required before DEQ terminated the PWC 1200C Construction Stormwater Permit on April 27, 2022.

With this in mind, Perennial vigorously disagrees with Riverkeeper’s brazen assertions of illegality. Perennial performed within the parameters granted by ODOE and other relevant state and local agencies. See OAR 345-025-0006 (requiring site certificate holder to design, construct, operate, and retire the facility “[i]n compliance with all applicable permit requirements of other state agencies”).

Perennial Site Termination Request Protects Public Health, Safety, and the Environment; Removal of the Improvements Would do the Opposite

Pursuant to OAR 345-027-0110(5), Perennial has complied with the requirements to terminate the site certificate. This includes “A plan for retirement that provides for completion of retirement without significant delay and that protects public health, safety and the environment.” § 5(a). Keeping the completed access road and bridge intact is the environmentally prudent decision and protects the public health, safety, and the environment by preventing needless waste and destruction to the area. Riverkeeper’s request to require Perennial to remove the road and bridge would render the opposite result.

Demolishing the road and bridge as Riverkeeper proposes would negatively impact the environment by creating significant waste during the removal process and waste in natural resources by causing the property to be inaccessible again. Perennial would expend more energy costs to rebuild the same road and bridge over the same area of land, which Perennial reserves its right to do so. Removing the road and bridge just to rebuild the same later would generate needless solid waste, disrupt the irrigation ditch, increase energy costs, and generate significant environmental impact.

Allowing the road and bridge to stay poses no threat to the public health, safety, and welfare. The road and bridge create value and increase the usefulness of the land, thereby contributing to the public health and safety of the area by allowing for vehicle access to the property when there was none, which the Riverkeeper Comment concedes. Perennial has met the requirements of restoring the land to a useful, non-hazardous condition, minimizing impacts to fish, wildlife and the environment during the retirement process, while also protecting the public health, safety, and environment.

Indeed, the Umatilla County’s Department of Land Use Planning that granted the permit to construct the road and bridge concluded that,

“existing developments on the property [the access road and bridge] are considered accessory to the use of the property and will be allowed to continue use after project termination.”

Notably, the Friends Comment is supportive of site termination without any additional requirements.¹

¹ Both Friends and Riverkeeper Comments make other assertions that Perennial disagrees with, but in the interest of time, does not address in this response. Perennial expressly reserves all rights to respond and does not waive any argument or defense.

Riverkeeper Comment Repeats Arguments From Prior Litigation

To the extent Riverkeeper simply seeks another audience to re-hash arguments previously made in U.S. District Court that the alleged discharges of stormwater from the Site could be asserted under the Clean Water Act against PPH, Perennial refers ODOE to the June 6, 2022 Consent Decree (“**Order**”) entered in *Columbia Riverkeeper v. Perennial Power Holdings, Inc. et al.* (Case No. 2:20-cv-02256-H). The parties sought to settle disputed alleged facts and law, including the same allegations made in the Riverkeeper Comment. Riverkeeper agreed to release those claims and the U.S. District Court for the District of Oregon dismissed them with prejudice. Terminating the EFSC Site Certificate was the basis of the Consent Decree, without requiring removal of the access road and bridge.

Perennial and Riverkeeper (collectively, the “Parties”) enter into this agreement based on Perennial’s representation that it has since abandoned its plans to develop the Perennial Wind Chaser Station, has requested DEQ terminate its Permit for the project, and is in the process of **terminating the EFSC Site Certificate**.

Had the Parties contemplated removal of the access road and bridge as a precondition to terminating the Site Certificate, they would have included that in the Order, especially since both the road and the bridge were fully completed and operational at the time the Order was signed. Instead, the Order requires Perennial to take certain actions, including making a significant payment of monies to a third-party environmental fund and payment of Riverkeeper’s litigation expenses and costs, which PPH has completed. For Riverkeeper to insist that ODOE penalize Perennial by requiring removal of the road and bridge over the same alleged activity asserted in the prior litigation – litigation under which Perennial never admitted fault – would be at best an inequitable double-penalty. Moreover, the ODOE public comment period is not the proper forum for Riverkeeper to revisit settled matters in litigation.

Perennial values and respects ODOE’s important role in protecting the environment, and we take our own commitment to good environmental stewardship seriously. Perennial requests ODOE grant the termination of the site certificate as fully stated in its July 18, 2022 application.

Sincerely,

JJ Jamieson

JJ Jamieson

Vice President, Operations and Development

Perennial Power Holdings, Inc.

Senior Vice President, Hermiston Generating Company